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In the Supreme Court of the United States

No. 623, No. 624, No. 625 (Consolidated)

OKLAHOMA TAX COMMISSION OF THE STATE OF OKLAHOMA,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
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SUPPLEMENTAL BRIEF FOR PETITIONER, OKLAHOMA TAX COMMISSION

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ARGUMENT

(Emphasis supplied)

The question herein involved concerns the right and power of the State of Oklahoma to assess an inheritance tax against the transfer of the estates of full blooded restricted

deceased Indians, members of the Five Civilized Tribes. It is conceded that the estates herein involved are restricted. Act of May 27, 1908, 35 Stat. 312, as amended by Act of April 12, 1926, 44 Stat. 239; Act of Jan. 27, 1933, 47 Stat. 777. The purpose of this brief is to extend the discussion of the propositions presented in the brief supporting the application for certiorari.

The Oklahoma law of descent and distribution applies to the estates of the Five Civilized Tribes as a law of the state, and not as a law of Congress.

Basically, inheritance and estate taxes constitute excises or charges upon the devolution of an estate. This is based upon the premise that the rights to receive or transmit property are not natural rights, but are creatures of the Legislature, and are, therefore, subject to taxation by the authority which created them, or contributed to their creation and protection.

In the case of *The Estate of Helen McKennan* (S. D.), 126 N. W. 611, 33 L. R. A. (N. S.) 606, it is stated in paragraph 1 of the syllabus:

> "An inheritance or succession tax is a tax upon the exercise of the right to transmit property, and is based upon the right of taxation, and not upon the right to regulate the succession of property.
>
> "4. A succession tax of property transmitted to a widow and certain heirs, is not one on property.

"5. A succession tax, not being a tax on property, is not affected by constitutional provision that all taxes shall be uniform."

In the case of *Knowlton* v. *Moore*, 178 U. S. 41, it is stated in the body of the opinion:

"An inheritance tax is not one on property, but one on the succession. The right to take property by devise or consent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

The court was here quoting from the case of *Scholey* v. *Rew*, 23 Wall. 331. In the opinion, the court says:

"Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, or privilege taxes, nevertheless, tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the trans-

mission from the dead to the living, on which such taxes are more immediately rested.

"Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, therefore, the levy by Congress of a tax on inheritance or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government * * *.

"But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the state to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest, is the transmission or receipt, and not the right existing to regulate. In legal effect, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand, or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the states to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government from almost every subject of direct, and many acknowledged objects of indirect taxation * * *.

"Can it be said that the property when imported and commingled with the goods of the state cannot be taxed,

> because it had been at some prior time the subject of exclusive regulation by Congress? * * * If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and State governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient, and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists."

Expressed in terms of the text writers, Sec. 3, Part 2, Gleason and Otis, 4th Edition:

> "Fundamentally, the tax rests upon the proposition that a man cannot take with him into the world beyond, the possessions he has acquired here. When he dies, the possessions become the property of the state, or to such persons as the laws of the state may direct. Descent is a creature of statute, and not a natural right."

From the foregoing, it may be deduced that inheritance, estate, transfer or succession taxes are primarily an incident of probate jurisdiction, and that such laws levying taxes of either nature are incidents of the law of descent and distribution. The heir or legatee has no vested right in the

property of the ancestor until after death. The extent of title, right or interest the heir may take in the property of the deceased, depends on the degree of grace of the State law.

The case of *U. S.* v. *Perkins*, 163 U. S. 625, states:

> "Thus, the tax is not upon the property in the ordinary sense of the word, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

The heir or legatee has no vested interest in the property of the ancestor; he enjoys only the prospect of inheritance at the death of the ancestor; therefore, a tax in the form of an excise on the devolution of the estate, could not burden the property of the heir; the excise is exacted before he receives it, and such tax is permissible. When the Congress provided that the law of descent and distribution, including the determination of heirship as applied to the Five Civilized Tribes, should be the laws of the State of Oklahoma, the Congress put into effect all of said laws of descent and distribution, together with the probate procedure which said laws included, as an essential component part thereof, the charges, excises or other contributions to the state.

This Court, in the Perkins case last above cited, makes it clear that the heir receives nothing until after the estate shall have completely passed through the gauntlet of state administration, subject to whatever contributions therefrom the state law demands.

The Act of May 27, 1908, 129, Sec. 9, 35 Stat. 312, recognized and treated the laws of descent and distribution of the State of Oklahoma, as applicable to land allotted to members of the Five Civilized Tribes.

We call attention in this connection to the case of *Coolidge* v. *Long*, 282 U. S. 582, to the effect that:

> "No one has a natural right either to own property, or to transfer it at his death, but derives the power to do so solely from the state."

And in *Dunn* v. *Micco*, 106 Fed. (2d) 356, at page 359 of the body of the opinion:

> "Furthermore, Congress, by the proviso to Section 9 of the Act of May 27, 1908, recognized and treated 'The law of descent and distribution of the State of Oklahoma' as applicable to lands allotted to members of the Five Civilized Tribes. *Jefferson* v. *Fink*, 247 U. S. 388."

The foregoing considerations bring us to the question of whether or not there is anything in the Enabling Act, admitting Oklahoma to statehood, or in the Oklahoma Constitution, accepting the terms of the Enabling Act, which militates against the tax sought to be assessed in this case. Section 1 of the Enabling Act (34 Stat. 267), provides:

> "That nothing contained in the said constitution shall be considered to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished), or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights, by

treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

Section 3, sub-section 3 of the Enabling Act, reads:

"The people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to * * * all lands lying within said limits, owned or held by any Indian, tribe or nation; * * *."

The Constitution of Oklahoma, Article 1, Section 3, disclaims title as to lands of the Indians, in the following language:

"The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to * * *; and to all lands lying within said limits, owned or held by any Indian, tribe or nation; * * *."

In the section of the Oklahoma Constitution, specifying tax exemptions, being Article 10, Section 6, it is provided:

"All property * * * and such property as may be exempt by reason of treaty stipulations existing between the Indians and the United States Government, or by Federal laws during the force and effect of such treaties or Federal laws, * * *"

shall be exempt.

There is neither a treaty stipulation between the Indians and the National Government, nor is there any Act of Congress which forbids the tax. The sole ground on which immunity is based is the provision of the Federal Constitution giving Congress exclusive jurisdiction over Indian tribes, and such Acts as relate to the power of the Secretary of the

Interior to manage their affairs, including the right of Congress (which has been unexercised as to the Five Civilized Tribes) to legislate directly in casting the descent, and the distribution of Indian estates by Congress itself, or through any existing primary department of the Federal government.

The case therefore pivots on the point of whether or not the estate devolves by virtue of the National Law, or as a transfer made pursuant to the laws of the State of Oklahoma.

The Solicitor General cites four cases in support of the argument that the property is passed from the ancestor to the heir by authority of Congress, notwithstanding the adoption of the provisions of the laws of Oklahoma, for the purposes of determining heirship, and otherwise casting the inheritance.

In reading the cases cited, we fail to find any one of them supporting the Solicitor's point of view. The case of *Jackson* v. *Harris*, 43 Fed. (2d) 513, hereinabove referred to, negatives the position of the Solicitor in unmistakable terms, and uses the following language:

> "Congress, making Oklahoma statute control the devolution of the estates of Indians in Oklahoma, did not adopt the law of Oklahoma as a Federal law, but merely provided that devolution should be in accordance with local law."

In *Jefferson* v. *Fink*, 247 U. S. 288, we discover nothing on the point, except the declaration of the court that:

> "The laws in force in the territory of Oklahoma, so far as applicable, should extend over and apply to the state;"

citing the Oklahoma Constitution, Article 25, Section 2, making a similar provision, and held further that the Oklahoma statutes of descent supplanted the Arkansas statute, and governed the descent of Creek allotments. In the body of the opinion, on the last page thereof, it is stated:

> "The state was admitted into the Union November 16, 1907, and thereupon, the laws of the territory relating to descent and distribution became the laws of the state."

Thereafter, Congress by the Act of May 27, 1908, recognized and treated the laws of descent and distribution of the State of Oklahoma as applicable to the members of the Five Civilized Tribes.

The cases of *Parker* v. *Richard*, 250 U. S. 235; *In re*: *Jessie's Heirs*, 259 Fed. 694 (E. D. Okla.), and *In re*: *Fulsom's Estate*, 141 Okla. 300, are no doubt cited by counsel for respondent to support their contention that there is no material distinction between the facts set forth in the Beaver case, 270 U. S. 555, and the facts in the cases at bar.

These cases in effect hold that the county courts of the State of Oklahoma in determining heirship in cases of the character here involved, under authority conferred upon them

by the Act of Congress of June 14, 1918 (40 Stat. 606, 25 U. S. C. A., Sec. 375), in effect act as Federal Agencies. This Act provides:

> "A determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, That an appeal may be taken in the manner to the court provided by law, in cases of appeal in probate matters generally: Provided further, That where the time limited by the laws of said state for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, *but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws*: Provided further, that said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said state; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing (June 14, 1918, c. 101, No. 1, 40 Stat. 606)."

It is the theory of the Solicitor that in this respect there is no material difference or distinction between the Federal Acts applicable to members of the Five Civilized Tribes of Indians and other tribes to which the Act of June 25, 1910, as amended by the Act of February 14, 1913, is made applicable; that as to the Five Civilized Tribes, the Act of Congress designates the county courts as a Federal Agency to determine heirship and that as to other tribes the Secretary of the Interior is designated as such agency for this purpose and that the distinction therefore sought to be made by petitioner, between the facts in the case at bar and the Beaver case, *supra*, is untenable.

There is, however, a material distinction in this respect between the Five Civilized Tribes of Indians and other tribes referred to in the Beaver case.

The courts of the State of Oklahoma ever since the admission of the State into the Union, had authority, power and jurisdiction to determine as a matter of fact, who constitute the heirs of deceased restricted Indians of the Five Civilized Tribes. This jurisdiction has at all times been and is now vested in the district courts of the State, independent of the Act of Congress of June 14, 1918, conferring such jurisdiction upon the county courts of the State. This jurisdiction has always been exercised by the district courts of the State under their equity powers to determine title to land.

This contention is supported by an opinion of the Supreme Court of the State in the case of *March* v. *Peter*, 179 Okla. 207, 64 Pac. (2d) 912. It is there said:

> "The authority vested in the county courts of this state by the Act of Congress of June 14, 1918, 40 St. at L. 606, to make a conclusive determination of who are the heirs of a deceased citizen allottee of one of the Five Civilized Tribes of Indians having restricted heirs, is not exclusive. It does not deprive the district courts of the state of jurisdiction or authority to determine the same question in suits involving the allotted lands of such a deceased allottee. In such action, if there has been a previous valid determination of heirship by the probate court which has not been disturbed on appeal, it is conclusive on the question. Otherwise the district court may investigate the question and exercise its own independent judgment based upon the evidence produced."

In the case of *Homer* v. *Lester*, 95 Okla. 284, 219 Pac. 392 (Certiorari denied, 264 U. S. 508), the Supreme Court of the State, beginning at page 291, said:

> "We have no disposition to modiy the holding in *State ex rel. Miller* v. *Huser, supra*, that 'Congress had authority to make the county officers federal agencies and administrative, as distinguished from courts exercising strictly judicial powers,' to determine conclusively heirship to restricted lands; that is, determine who are the restricted heirs of deceased allottee. Congress not only has the power to constitute the county courts its agents to determine heirship to restricted lands, but may, in its discretion, take away that authority from county courts and confer it upon the Secretary of the Interior, or the Superintendent of Indian Affairs, or any other officer of the United States. *But, as held by the United States Circuit Court of Appeals for the Eighth Circuit in Mc-*

Dougal v. Black Panther Oil & Gas Co., 273 Fed. 113, the jurisdiction of the probate courts under the Act of Congress of June 14, 1918, is 'Concurrent with the Federal and State district courts of the question who were the restricted heirs of the respective deceased allottees described in the Act.' In other words, the Federal district court in a proper case has authority to determine the heirs, and likewise the state district court in proper cases has jurisdiction to determine the heirs, and the Act of Congress expressly recognizes that the state and federal district courts have at all times possessed that jurisdiction, because the act says: 'But this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws.' "

In the case of *Roberts* v. *Anderson*, 66 Fed. (2d) 874, the Circuit Court of Appeals of the Tenth Circuit, speaking on this same question, said:

"It is now entirely settled that the act empowering the county courts of Oklahoma to determine heirship does not prohibit other courts from ascertaining and deciding the facts as to heirship whenever necessary in litigation in such other courts. Judge Sanborn, speaking for the Eighth Circuit Court of Appeals in *McDougal* v. *Black Panther Oil & Gas Co.*, 273 Fed. 113, 118, examined the question from the standpoint of the statutes, the decisions, and public policy, and so determined; that decision has been followed in a great mass of litigation over Indian titles.

"Judge Rainey, speaking for the Supreme Court of Oklahoma, in an opinion characterized by Judge Sanborn as 'exhaustive, instructive and convincing,' came to the same conclusion in *State* v. *Huser*, 76 Okla. 130, 184 Pac. 113, 122, and *State* v. *Wilcox*, 75 Okla. 158, 182 Pac. 673, where a writ of prohibition directed to the judge of a superior court who was about to determine

heirship as an incident to a suit to quiet title, was denied. See, also, *Homer* v. *Lester*, 95 Okla. 284, 219 Pac. 392.

"From these authorities it is clear that while the county court has jurisdiction to determine the fact of heirship of deceased citizen allottees of the Five Civilized Tribes, such jurisdiction *is not exclusive but concurrent;* and that where such fact of heirship is necessary for the determination of actions pending in another court, such court may determine such fact, and need not stay its hand until the county court has acted. The first valid adjudication of the fact by either court is conclusive upon the other within the principles of estoppel by judgment."

This rule does not prevail as to the Quapaw Tribe of Indians and other tribes governed by the Act of Congress of June 25, 1910, as amended by the Act of February 14, 1913, as to such tribe of Indians, no court in the State of Oklahoma has authority or power to determine heirship in advance of such determination by the Secretary of Interior. This position is sustained by this Court in the case of *Hallowell* v. *Commons*, 239 U. S. 506. This case holds that the Act of June 25, 1910, vesting in the Secretary of Interior the power and authority to determine heirship as to Indians controlled by that Act, operates to divest the Federal courts of all equitable jurisdiction to determine title to land on application of the alleged heirs of such deceased Indians.

It will thus be seen from the above authorities that restricted heirs of deceased members of the Five Civilized Tribes independent of the Act of Congress conferring jurisdiction upon the county courts to determine heirship, may

in a proper case, apply to the district court of the State in order to have such heirship determined; that they may utilize such courts to determine their rights as heirs of their deceased ancestors.

The courts of the State are not open to the heirs of deceased Quapaw Indians to determine such rights, as, to them, such rights are determined by the Secretary of the Interior, and by him alone.

Therein as stated in our Brief in Support of Petition for Certiorari, lies the distinction between the Beaver case and the case at bar.

Assuming, however, that the situation between these tribes of Indians is somewhat analogous, it might not be amiss or incorrect to state that when the Enabling Act provided that the laws of Oklahoma Territory should be the laws of the State, and the Congress provided that the descent and distribution of the land of deceased members of the Five Civilized Tribes should devolve or be transmitted according to the laws of the State of Oklahoma, such laws remained the laws of the State of Oklahoma, as distinguished from the laws of Congress; OTHERWISE, SUCH ATTEMPT WOULD NOT BE IN HARMONY WITH THE CONSTITUTION OF THE STATE OF OKLAHOMA, NOR ARTICLE 3 OF THE CONSTITUTION OF THE UNITED STATES, WHEREIN THE JUDICIAL POWER OF THE UNITED STATES IS DEFINED AND LIMITED TO THE

COURTS THEREIN SPECIFIED, OR TO OTHER FEDERAL COURTS, ORDAINED AND ESTABLISHED BY THE CONGRESS.

The county court of Oklahoma is a judicial court; and administration of an estate in the exercise of probate jurisdiction, is a judicial proceeding; appeal lies to the district court, which is the judicial court of general jurisdiction of the State of Oklahoma; from that court an appeal lies to the Supreme Court of the State of Oklahoma, in probate matters. Is it to be understood that each of these tribunals in turn, constitutes an instrument of the Federal Government, administering a Federal law? If so, what would mark the limitation on the power of the Federal Government to establish judicial power as defined in Section 3 of the Federal Constitution, by creating judicial instrumentalities of the state courts, and what of the Oklahoma Constitution, which defines and limits the judicial power of its own court?

In presenting the above, we are mindful of *Minn. & St. L. Ry. Co.* v. *Bombalis*, 241 U. S. 211, but do not believe the doctrine therein announced permits the complete adoption of a system of state law as a Federal law, to be administered by a state court as an exclusively Federal instrument, but it is an example of the co-operative or joint action inherent in the principle of our dual Federal and State system.

It may not be amiss to observe that at the time of the enactment of the Acts of Congress, conferring the laws of the

State of Oklahoma and the jurisdiction of the Oklahoma County Court to cover the administration of Indian estates, that it was looking forward to the early closing up of Indian supervision, and that as the restrictions were removed by death, the lands descending to the heirs became free, and therefore subject to the jurisdiction of the court having settlement of the estate, under the laws of the state; and to avoid a divided jurisdiction as to restricted and non-restricted Indian estates, the laws of the state were adopted.

BOTH SOVEREIGNTIES MAY ACT JOINTLY

May not the transmission of the estates of deceased members of the Five Civilized Tribes be brought about by the laws of both the Federal and State governments, operating in conjunction, and both together, effecting the transmission of title from the ancestor to the heir? It is not a question of degrees of contribution of the respective governments, but each, contributing in co-ordination, satisfies the element precedent to authority to lay the tax.

A case in point is that of *State Tax Commission of Utah* v. *Aldridge*, 116 Pac. (2d) 923, 316 U. S. 174. There the Supreme Court of the state disallowed the tax on the strength of the opinion of this Court in *First Nat'l Bank* v. *Maine*, 284 U. S. 312, at the same time stating that but for that case the tax would be sustained, but the state court felt constrained to follow this Court's opinion, as long as same was not overruled; indicating that were the matter an original proposi-

tion, the decision would have been otherwise. In the instant case, the Circuit Court made practically the same announcement, to the effect that while it thought the tax was within the scope of the state's jurisdiction, so long as the case of *Childers* v. *Beavers*, 270 U. S. 555, remained intact, the Circuit Court was bound to follow it, and that this Court was the only court which could terminate the rule announced in the Beavers case.

In *State Tax Commission of Utah* v. *Aldrich, supra,* the rule stated by Mr. Justice Frankfurter, should rule this case. It is there held:

> "Modern enterprise often brings different parts of an organic commercial transaction within the taxing power of more than one state, as well as of the Nation. It does so because the transaction in its entirety may receive the benefits of more than one government, and the exercise by the states of their constitutional power to tax may undoubtedly produce difficult practical and fiscal problems, but they are inherent in the nature of our federalism, and are part of its price."

In the instant case, we know of no reason why the functioning of the state courts in administering the estate of the Indian under the state laws and procedure, authorized by the Congress, does not make the state laws and state instrumentalities at least substantially contributing factors in the transmission of the estate from the ancestor to the heir; and it would appear that such contribution was, within itself, enough on which to lay the taxing power. If the proposition should be reduced to a matter of degrees, then it would ap-

pear that in the actual transmission of the estate, there is a greater degree of exercise and activity on the part of the state laws and machinery, than there is in the mere permissive granting of authority by the Congress. This is given emphasis, when we realize that it is within the power of Congress to reassert full dominion over the subject-matter. When it has not done so, and permits the state to use its laws, courts and officers in the performance of the transmission of the estate, the consent of Congress for the state to compensate itself through reasonable taxation, may well be presumed. Furthermore, it is within the power of Congress to deny the right of taxation by direct and positive enactment, and if it intended to withhold the power of taxation from the state, it should have done so.

An example of the principle of co-operative exercise of jurisdiction is found in *In re. Jessie's Heirs, supra,* wherein it is stated in that case, that in order to permit the exercise of jurisdiction by the county court of Oklahoma conferred under the Act of Congress of June 14, 1918, to determine the heirs of full-blood Creek Indians, and to prevent conflict with the Oklahoma Constitution, Article 7, Section 12, the 1919 Oklahoma Act was supplemented by a proviso to give concurrence to said procedure, the Act of Congress of June 14, 1918, providing for the determination of heirs of any deceased allottee of the Five Civilized Tribes.

In the case of *Mudd* v. *Perry,* 25 Fed. (2d) 85, having under consideration "The Act of Congress of April 18,

1912," 37 Stat. 86, with reference to an Osage estate, it was held:

> "This was a devolution by Congress of judicial authority upon the county courts of Oklahoma, to determine judicially, among other things, who were rightful claimants to the estate of deceased allottees of the Osage Indian Tribe. It was more than a mere selection of the county court for the performance of a ministerial or executive duty. It involved, as Congress must have intended, a judicial inquiry. The county courts of Oklahoma were not designated as agents or final arbiters in such matters, but it was provided that such estates 'shall, in probate matters, be subject to the jurisdiction of the county courts.' "

The above was quoted with approval in the case of *Thompson's Estate,* 179 Okla. 240, 65 Pac. 442. In that case, it is said at page 241:

> "In view of the foregoing decisions, the county courts, under the Act of 1912, are left free to exercise the same jurisdiction and powers over the estates of deceased Osages as it may in the administration of the ordinary citizens, under the Constitution and laws of this state."

And at page 242 (Okla. Rep.):

> "Under the Act of 1912, the county court, in the estates of deceased Osages, acts judicially as a court of probate, and not as a Federal administrative agency."

The case of *Childers* v. *Beavers,* 270 U. S. 555, should not be followed in this instance, and if not distinguishable, should be overruled. The Circuit Court in its opinion in this case, page 338, 131 Fed. Sess., states:

> "It is true that the instrumental doctrine as applied to restriction on lands of Indians, has been limited by

the decision of the Supreme Court in *Helvering* v. *Mountain Producers Corporation*, 303 U. S. 375, which expressly overruled the Coronado and Gillespie cases; but *Childers* v. *Beavers*, *supra*, has not been overruled, and this court is still bound by that decision.

"Restricted Indians in Oklahoma enjoy the privileges and protection of local laws. The local courts are open to them for the redress of grievances. The estates of deceased members of the Five Civilized Tribes are administered in the county courts of Oklahoma. Their wills are probated, and their heirs determined in such courts. Members of the Five Civilized Tribes are citizens of Oklahoma, and enjoy the privileges and benefits of that citizenship. It would seem to the reader of this opinion that the Enabling Act should be considered as consenting to the application of the local law of Oklahoma, with respect to the devolution of property of Indians who are administered in and residents of that state, and that such property should be regarded as passing under the laws of Oklahoma, and subject to inheritance tax by Oklahoma. *But that, however, could only prevail if Childers* v. *Beavers, supra, were overruled. Whether it shall stand or be overruled, only the Supreme Court of the United States may decide.*"

The distinction between the circumstances of the Beavers case and that of the instant case may be found in the fact that under the express provisions of the Act of Congress governing the Quapaw Indians, the Secretary of the Interior was clothed with power to determine the heirs according to the State law of descent, and Congress directed the devolution of lands in case of death of the restricted owner. The action of the Secretary of the Interior was, of course, ministerial. In the Quapaw situation, the Secretary of the Interior also

had the power to supervise the execution of wills, and disapprove same, without regard to the Oklahoma law.

This distinction and other grounds for differentiating the facts, are clearly set out by Judge Murrah in the dissenting opinion, and offer a correct solution of the case, unless the Beavers case is to be overruled in its entirety, which, in our opinion, should be done.

In the Murrah opinion, at page 639, is to be found the following:

> "Under the express provisions of this Act, *supra*, 'it was the duty of the Secretary of the Interior to determine the heirs according to the state law of descent,' but Congress provided how the lands should descend and directed how the heirs should be ascertained. The law of descent in Oklahoma is applicable only insofar as it is made a criterion for the guidance of the Secretary of the Interior, whose administrative duty it is to approve the execution of a will by an Indian ward, or to disapprove the same without regard to the law of Oklahoma. It is only after the disapproval of the will that the Secretary of the Interior is directed to determine heirship in accordance with the laws of Oklahoma. In no event does the law of Oklahoma have any operation or effect upon the execution of the will or the validity thereof. Neither are the courts of Oklahoma utilized to determine heirship in the event its laws become relevant. But the determination of heirship is an administrative function entrusted to the Secretary of the Interior, guided by local law. The probate courts of Oklahoma have no jurisdiction over the will or the determination of the heirship. *Blanset* v. *Cardin*, 256 U. S. 319, 41 S. Ct. 519, 65 L. ed. 950; *Hanson* v. *Hoffman* (10 Cir.), 113 Fed. (2d) 780.

"But with respect to members of the Five Civilized Tribes, the Congressional policy as expressed by numerous statutes is entirely different. The history relating to the application of the laws of Oklahoma to the Five Civilized Tribes, including the law of descent, is well stated by the majority and need not be repeated here. It is sufficient to say that long prior to statehood, the prevailing law in the Indian Territory was applicable uniformly to the Indian as well as the white man. The Indian citizen was equally entitled to its protection and equally amenable to its processes.

"With exceptions not material here, a member of the Five Civilized Tribes is authorized to dispose of his or her estate on the same footing as any other citizen. They are authorized to dispose of their estates by will in accordance with the laws of Oklahoma and not in derogation thereof. The law of Oklahoma is not merely a guide or criterion, but it creates the right and provides the means and manner of disposition. *Jefferson* v. *Fink*, 247 U. S. 288, 38 S. Ct. 516, 62 L. ed. 1117; *Blundell* v. *Wallace*, 267 U. S. 373, 45 S. Ct. 247, 69 L. ed. 664; see also *Caesar* v. *Burgess* (10th Cir.), 103 Fed. (2d) 503.

"In my judgment, the valid distinction made clear by a comparison of *Blanset* v. *Cardin*, *supra*, and *Blundell* v. *Wallace*, *supra*, furnished the basis for the denial of the taxing power of the state in *Childers* v. *Beaver*, *supra*, and the sanction of that power under the attendant circumstances. In *Blanset* v. *Cardin*, *supra*, the property was transmitted under and by virtue of an Act of Congress which provided the means and manner by which the property would pass, and its passing depended upon the administrative determination of the Secretary of the Interior, and not the courts of Oklahoma. The law of Oklahoma had relevancy only as a guiding principle which acted only by force of the administrative agency empowered to administer it. While in *Blundell* v. *Wallace*, *supra*, the laws of Oklahoma and the courts which interpreted them were made the arbiters of the

right to direct the testamentary disposition, and the law of descent determined its disposition. As respects members of the Five Civilized Tribes, the right to dispose of their property by will is created by the law of Oklahoma. The executed will is valid according to Oklahoma law and it is enforceable only in the courts of that state. In the absence of a will, the right to inherit is created by Oklahoma law and is enforceable in its courts and not elsewhere or otherwise. Therein lies the incidence of the tax and the power to enforce it.

"* * * Neither has the Federal government expressly or inferentially exercised its indubitable power to exempt the transmission of the estates from the scope of the state taxing act. Nothing stands in the way of the exaction of the tax except the question of whether the property passes under the laws of the state. In my judgment, it does and the tax should be sustained."

A further distinction may be made between the Beavers case and the case at bar. This Court in that case, as before stated, was construing the Act of June 25, 1910, as amended. This Act specifically provides that upon disapproval of the will of an Indian controlled by that Act, his property should descend or be distributed in accordance with the laws of the State wherein the property is located. Congress has enacted no similar law concerning the descent or distribution of the property of members of the Five Civilized Tribes of Indians in Oklahoma. There is no specific Act of Congress directing the manner in which the property of such Indians should descend or be distributed, except the Act of May 27, 1908, Sec. 9, 35 Stat. 312, which provides that where there is issue born since March 4, 1906, the homestead shall remain

restricted and be inalienable during the life of such issue: but if there be no issue born subsequent to that date, then the homestead shall descend, free from all restrictions, in accordance with the laws of the State of Oklahoma. The only other Act of Congress touching on this subject concerning the Five Civilized Tribes appears in the Enabling Act, which provides that upon the admission of the State into the Union:

> "All laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State except as modified or changed by this Act or by the Constitution of the State . . . ."

This being true, it is our contention that upon the acceptance of this Act by the Constitutional Convention and the adoption of the Constitution of the State, by the people, the law of descent and distribution then in force in the Territory of Oklahoma, including that of descent and distribution of Indian lands, became a law of the State of Oklahoma and remained a law of the State as applicable to Indian estates, except as thereafter changed by specific Act of Congress; and since Congress has at no time seen fit to exercise its right to specifically direct the manner in which the property or estates of deceased members of the Five Civilized Tribes should descend or be distributed, the law of the State of Oklahoma in this respect controls not as a Federal law, but as a law of the State.

We, therefore, submit that the language used by this Court in the Beavers case, that the land there involved "pass-

ed under a law of the United States, and not by Oklahoma's permission" is not at all applicable to the case at bar.

The Court in the above case did not hold, and we submit that it did not intend to hold, that simply because Congress through the Enabling Act gave its consent to the State to put in force relative to these Indian estates the laws of descent and distribution of the State, that such law after having been put in force by the State should constitute and forever thereafter remain a Federal law.

We, therefore, respectfully submit that for the reasons stated in the original brief and herein, the judgment of the Circuit Court be reversed and the tax be sustained.

Respectfully submitted,

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March, 1943.

APPENDIX TO BRIEF

(Acts of Congress)

Act of May 27, 1908, 35 Stat. 312, Section 9, provides:

"That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: *Provided further*, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in Section 1 hereof, for the use and support of such issue, during their life or lives, until April 26, 1931: but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; but if this be not done, or in the event the issue hereinbefore provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided further*, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section."

Section 1 of the Act of April 18, 1926, 44 Stat. 239, provides:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the aliena-

tion of said allottee's land: Provided, that hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by Section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, That the word 'issue,' as used in this section, shall be construed to mean child or children: Provided further, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section: And provided further, That all orders of the county court approving such conveyances of such land shall be in open court and shall be conclusive as to the jurisdiction of such court to approve such deed. Provided, That all conveyance by full-blood Indian heirs, heretofore approved by the county courts, shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same interest in the same land has been made by the same Indian to different grantees and approved by county courts of different counties prior to the passage of this Act, and except that this proviso shall not affect and may not be pleaded in any suit brought before the approval of this Act."

Section 1 of the Act of May 10, 1928, 45 Stat. 495, provides:

"That the provisions of Section 9 of the Act of May 27, 1908 (35 Stat. L. 312), entitled 'An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes,' as amended by Section 1 of the Act of April 12, 1926 (44 Stat. L. 239), entitled 'An Act to amend Section 9 of the Act of May 27, 1908 (35 Stat. L. 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes,' be, and are hereby, extended and continued in force for a period of 25 years from and including April 26, 1931, except, however, the provisions thereof which read as follows:

"Sec. 2.

" 'Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the lands shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided, That the word "issue," as used in this section, shall be construed to mean child or children: Provided further, That the provisions of Section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section:' which

quoted provisions be, and the same are, repealed, effective April 26, 1931: Provided further, That the provisions of Section 23 of the Act of Congress approved April 26, 1906 (34 Stat. L. 137), as amended by the provisions of Section 8 of the Act of Congress approved May 27, 1908 (35 Stat. L. 312), be, and the same are, hereby continued in force and effect until April 26, 1956.

"Sec. 3. That all minerals, including oil and gas, produced on or after April 26, 1931, from restricted allotted lands of members of the Five Civilized Tribes in Oklahoma, or from inherited restricted lands of full-blood Indian heirs or devisees of such lands, shall be subject to all State and Federal taxes of every kind and character the same as those produced from lands owned by other citizens of the State of Oklahoma; and the Secretary of the Interior is hereby authorized and directed to cause to be paid, from the individual Indian funds held under his supervision and control and belonging to the Indian owners of the lands, the tax or taxes so assessed against the royalty interest of the respective Indian owners in such oil, gas and other mineral production.

"Sec. 4. That on and after April 26, 1931, the allotted, inherited and devised restricted lands of each Indian of the Five Civilized Tribes in excess of 160 acres shall be subject to taxation by the State of Oklahoma under and in accordance with the laws of that State, and in all respects as unrestricted and other lands: Provided, That the Indian owner of restricted land, if an adult and not legally incompetent, shall select from his restricted land a tract or tracts, not exceeding in the aggregate 160 acres, to remain exempt from taxation, and shall file with the Superintendent for the Five Civilized Tribes a certificate designating and describing the tract or tracts so selected: And provided further, That in cases where such Indian fails, within 2 years from date hereof, to file such certificate, and in cases where the Indian owner is a minor or otherwise legally incompetent,

the selection shall be made and certificate prepared by the Superintendent for the Five Civilized Tribes; and such certificate, whether by the Indian or by the Superintendent for the Five Civilized Tribes, shall be subject to approval by the Secretary of the Interior and, when approved by the Secretary of the Interior, shall be recorded in the office of the Superintendent for the Five Civilized Tribes and in the county records of the county in which the land is situated; and said lands, designated and described in the approved certificates so recorded, shall remain exempt from taxation while the title remains in the Indian designated in such approved and recorded certificate, or in any full-blood Indian heir of devisee of the land: Provided, That the tax exemption shall not extend beyond the period of restrictions provided for in this Act: And provided further, That the tax-exempt land of any such Indian allottee, heir, or devisee shall not at any time exceed one hundred and sixty acres."

The Act of January 27, 1933, 47 Stat. 777, provides:

"That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long

as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed 160 acres: And provided further, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in Section 3 of the Act approved May 10, 1928 (45 Stat. L. 495)."